

*ONTARIO*  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

**IN THE MATTER OF THE PROPOSAL TO CREDITORS OF  
CONFORTI HOLDINGS LIMITED, A CORPORATION  
INCORPORATED UNDER THE ONTARIO BUSINESS  
CORPORATIONS ACT, R.S.O. 1990, C. B.16**

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**PROPOSAL TRUSTEE'S FACTUM**  
(motion for court approval of proposal)  
(returnable July 19, 2022)

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July 8, 2022

**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto (ON) M5G 1V2  
Fax: (416) 597-3370

**R. Brendan Bissell** – LSO #: 40354V  
Tel: (416) 597-6489  
Email: [bissell@gsnh.com](mailto:bissell@gsnh.com)

**Joël Turgeon** – LSO #: 80984R  
Tel: (416) 597-6486  
Email: [turgeon@gsnh.com](mailto:turgeon@gsnh.com)

Lawyers for Crowe Soberman Inc. in its capacity  
as trustee to the proposal to creditors of Conforti  
Holdings Ltd.

## I. NATURE OF THIS MOTION AND OVERVIEW

1. This is a motion by Crowe Soberman Inc. in its capacity as proposal trustee (in such capacity, the “**Proposal Trustee**”) to the proposal to creditors of Conforti Holdings Limited (the “**Company**”) in respect of the court’s approval of the Company’s amended proposal to creditors dated March 31, 2022 (the “**Proposal**”) pursuant to s. 58 of the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”).
2. Moroccanoil, Inc. (“**Moroccanoil**”), a contingent creditor of the Company and the only party to have voted against the Proposal, has stated its intent to oppose this motion. The Proposal Trustee is not aware of any other opposition.
3. The Proposal Trustee understands that Moroccanoil’s opposition will be based on BIA s. 59(3) in relation to s. 173(o). This factum will set out the considerations that apply under that section as illustrated by the case law in order to hopefully assist the court and provide a framework for Moroccanoil and the Company to each make partisan submissions.
4. Should Moroccanoil rely on other grounds, the Proposal Trustee may deliver a reply factum, if necessary.

## II. FACTS

### A. Background and state of file<sup>1</sup>

5. The Company’s business was the operation of hair salons in malls and commercial office spaces, almost all of which were indoors. Before these proceedings, there were 52 such locations but there are now 35. The Company became insolvent due to reduced business

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<sup>1</sup> Report of Proposal Trustee on Proposal dated June 22, 2022 (the “**Proposal Report**”), tab 2 (page 8) of the Proposal Trustee’s motion record. The prior six Proposal Trustee reports provide additional background information and are available on [the Proposal Trustee’s website for this proceeding](#).

caused by the pandemic and imposed restrictions. The Company currently has approximately 540 employees.

6. The Company filed a notice of intention on September 28, 2020. Notice thereof was given to every known creditor as declared by the Company, which excluded Moroccanoil until rectified from June of 2021 onwards as discussed below.
7. Extensions of time to file a proposal were granted by the court on three occasions into March of 2021. The Company filed a holding proposal on March 12, 2021. A holding proposal was necessary because the Company could not formulate a final proposal in the uncertain and ongoing pandemic circumstances. The creditors adjourned the creditors' meeting to October 28, 2021 and subsequently to March 31, 2022.
8. The Company filed its substantive Proposal on March 21, 2022, re-amended on March 28, 2022; both were forwarded to every known creditor and the Official Receiver on the same days respectively, together with a notice of reconvened meeting of creditors in respect of the meeting adjourned to March 31, 2022, the Proposal Trustee's report to creditors, and attendant documentation tabled at the meeting. The same was also posted on the Proposal Trustee's website for this proceeding.
9. The Proposal was updated at the March 31 creditors' meeting to address certain creditors' questions and comments as to BIA s. 65.11.
10. The Proposal as re-amended and updated was approved by the requisite majorities at the March 31, 2022 meeting. Further details on the number and quantum of the creditors voting are in paragraphs 21 and 22, below.

## **B. Terms of Proposal<sup>2</sup>**

11. The Proposal Trustee considers that the terms of the Proposal are typical and based on commonly used and court-approved precedents. No term is problematic or extraordinary in drafting or scope. The salient terms of the Proposal are as follows (capitalized words are defined in the Proposal):

- a. Claims compromised are all Claims of any Person, both terms all-encompassingly defined, excluding Claims of Secured Creditors – s.1.1(g) and (cc), 2.1, and 3.1.
- b. Proposal is made to the Crown – s. 2.2.
- c. Company shall not dispose of assets other than as contemplated in the Proposal or in the normal course of business – s. 2.3.
- d. Order of payments in accordance with the BIA:
  - i. Administrative Fees and Expenses, “except as may be set out in the [BIA]” – s. 6.1.
  - ii. Proven Unsecured Claims of Preferred Creditors “in accordance with the scheme for distributions set forth in the [BIA]”, including for avoidance of doubt express compliance with BIA s. 60(1.3) (payment in full of defined employee and former employee claims upon court approval of proposal) and 60(1.1) (payment of defined Crown claims within 6 months of court approval of proposal), the text of which BIA sections is practically “copy-pasted” in the Proposal – s. 3.3.

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<sup>2</sup> A copy of the updated amended Proposal is Appendix “AC” to the Proposal Report (page 197 of the Proposal Trustee’s motion record).

- iii. Proved Unsecured Claims, and Claims of Landlords in accordance with BIA s. 65.2(4)(b)(i) and (ii) – s. 3.4.
- e. Trustee to provide notice to all known affected Creditors 30 days before the Claims Bar Date – s. 4.3.
- f. Company to constitute a lump-sum Creditor Payment Fund of \$2,430,000 upon court approval of the Proposal. This represents 22.7% of the dollar value of claims admitted for voting on the Proposal (i.e., \$10,709,205.04)<sup>3</sup> – s. 7.1(a) (see below at para. 17 for context as to the alternative term for a \$1,930,000 amount which now does not apply).
- g. Paid Net Judgment and Bond Funds to be added to the Creditor Payment Fund in accordance with the Costs Agreement, if those amounts materialize. For context and as stated in the Proposal, the Company and its principal are in litigation with Moroccanoil in the United States (the “**US Proceeding**”), and those amounts are contingent on the Company succeeding and collecting on its claims against Moroccanoil. The Costs Agreement is with the Company’s principal, Mr. Antonio Conforti, and is anticipated to provide for the latter’s retaining a portion (expected to be 40%) of the Paid Net Judgment and Bond Funds in consideration for his financing of all of the Company’s costs in the US Proceeding – s. 7.1(b).
- h. All Directors and Officers to be released from all claims, etc. that arose on or before the Filing Date and that relate to an obligation of the Company where the Director or Officer is liable in such capacity, upon the issuance of the Certificate of Full

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<sup>3</sup> See the voting summary, a copy of which is Appendix “AB” to the Proposal Report (page 194 of the Proposal Trustee’s motion record).

Performance, such release to have no effect in case of the Company's bankruptcy – s. 10.5.

- i. No release of claims **(i)** based in fraud or gross negligence, or **(ii)** against directors or officers relating to contractual rights, based in misrepresentations or wrongful or oppressive conduct, asserted by Secured Creditors, or based in fraud – s. 10.3(d)(i), (ii) and (iii), and 10.5.
- j. BIA s. 95 to 101 and any similar legislation do not apply to the Proposal or payments made thereunder – s. 10.7.

### **C. Other relevant facts**

#### **1. Date on which Moroccanoil became aware of the Company's notice of intention proceeding**

- 12. As noted above, Moroccanoil was not included on the Company's statement of affairs either at the time that the notice of intention was filed on September 28, 2020 or when the holding proposal was filed on March 12, 2021.
- 13. Moroccanoil's evidence is that it learned of the Company's BIA proceedings on June 7, 2021 through its American attorneys in the US Proceeding.<sup>4</sup>

#### **2. Initial lack of disclosure by the Company of a related party debt and security**

- 14. The Company included an indication, in the statement of affairs filed with its March 12, 2021 holding proposal, that Beauty Experts Inc. ("BEI"), a related corporation

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<sup>4</sup> Affidavit of Marie-Ève Bérubé-Côte sworn October 13, 2021, para. 27. This affidavit was part of the record for the Moroccanoil motion discussed in the next section. The Proposal Trustee understands that Moroccanoil will serve a responding motion record including such affidavit. When done, the Proposal Trustee will deliver an amended factum to insert the complete reference.

owned by the Company's principal, Mr. Antonio Conforti, was a secured creditor of the Company for approximately \$1.5 million.<sup>5</sup>

15. The Company had not disclosed the BEI security and debt in its original statement of affairs filed with its notice of intention on September 28, 2020, nor in subsequent motions to the Court for extensions of time heard on October 26, 2020, December 14, 2020 and January 27, 2021.
16. Moroccanoil made a motion challenging the BEI security. Pending resolution of the motion, the Company set aside the amount of the BEI claim (\$1.5 million). The Moroccanoil motion was heard on March 15, 2022. The Company filed its substantive Proposal (in its initial form) on March 21, 2022. The Proposal provides that (i) if the BEI security was declared invalid, then the Company would offer its creditors \$2,430,000, including the \$1.5 million set aside, and (ii) if the BEI security was upheld, then BEI would make a secured loan in any amount necessary to allow the Company to offer \$1,930,000 to its creditors (s. 7.1(a)). The court released its reasons on May 31, 2022, holding that the BEI security was invalid. The Proposal by its terms now offers \$2,430,000, i.e. the amount of the Creditor Payment Fund as seen above.
17. On cross-examinations related to the Moroccanoil motion, the Company's principal, Mr. Antonio Conforti, said *inter alia* that he did not believe that he had to disclose the BEI debt or security, due to being a related party. While the Proposal Trustee does consider the

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<sup>5</sup> A copy of the March 21, 2021 statement of affairs is Appendix "K" to the Proposal Report (page 85 of the Proposal Trustee's motion record).

non-disclosure to be an irregularity, the Proposal Trustee has no reason to doubt Mr. Conforti's sincerity as to the stated basis for what was a mistaken assumption.

### **III. ISSUES AND LAW**

18. The issue is whether the court should approve the Proposal.
19. The Proposal Trustee believes that the Proposal meets all the general requirements set out in the BIA, including as regards those specifically discussed below for completeness.

#### **A. General principles**

20. The courts have developed and applied the following general principles on motions for approval of BIA proposals:
  - a. the court must consider the interests of the debtor (e.g., in continuing in business), the creditors (e.g., to maximize their wishes and recovery), and the public (including the needs to preserve “commercial morality” and the integrity of the proposal and insolvency regimes).<sup>6</sup>
  - b. whether the proposal is more advantageous to creditors than a bankruptcy, and the proportion with which creditors have approved the proposal, are central considerations.<sup>7</sup> The courts have spoken of “deference” to the creditors’ manifested intention to go with the proposal and the recommendation of the proposal trustee.<sup>8</sup>
  - c. the court must also consider the interests of all stakeholders, and weigh the effects of the approval of the proposal versus those of a bankruptcy.<sup>9</sup>

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<sup>6</sup> *Paradis et Stesi Société immobilière*, [2019 QCCS 2016](#) (“*Paradis*”), paras. 31, 32; *Kitchener Frame Limited (Re)*, [2012 ONSC 234](#) (Morawetz J., as he then was) (“*Kitchener Frame*”), paras. 20, 22; *Re Wandler (Proposal)*, [2007 ABQB 153](#) (“*Wandler*”), para. 11; *Magi (Syndic de)*, [2006 QCCS 5129](#) (Gascon J., as he then was) (“*Magi*”), paras. 18, 19e); *Chan (Proposition de)*, [2007 QCCA 727](#) (“*Chan*”), para. 15.

<sup>7</sup> *Paradis*, paras. 23-25; *Magi*, para. 19c).

<sup>8</sup> *Paradis*, paras. 69, 70, 110; *Kitchener Frame*, para. 21; *Chan*, para. 16; *Dupré (Syndic de)*, [2011 QCCS 6165](#), para. 20.

<sup>9</sup> *Magi*, para. 19b); *Chan*, para. 17; *Paradis*, para. 27; *Wandler*, para. 11.

- d. the burden of proof that the proposal should be approved by the court lies with the debtor making the proposal,<sup>10</sup> although the court hears the proposal trustee's report.<sup>11</sup>

**B. Approval by requisite majorities (BIA s. 54(2)(d))**

- 21. This section of the BIA sets out that the Proposal must be accepted by a majority in number and two thirds in value of the creditors present and voting in each class of unsecured creditors. Here, there is only one class provided in the Proposal and the majorities are reached by way of approval of 26 out of 27 unsecured creditors present and voting, representing all but \$1 in value of claims accepted for voting purposes (\$10,709,205.04).
- 22. The only voting creditor that voted against the Proposal is Moroccanoil. Its claim, asserted in the US Proceeding, was admitted at a value of \$1, for purposes of voting only, due to its contingency. If the amount claimed by Moroccanoil (\$2,807,478.12) had been accepted as proved in full, the 2/3 majority in value would still be reached.<sup>12</sup>

**C. Release of claims against directors and officers (BIA s. 50(14))**

- 23. The Proposal's drafting in this respect "copy-pastes" the limitations set out in BIA s. 50(14). In the Proposal Trustee's view, this is a typical term.

**D. Proposed order of distributions (BIA s. 60)**

- 24. As seen above, the Proposal's order of distributions is in accordance with the BIA.

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<sup>10</sup> See *Magi*, para. 19a); *Chan*, para. 17; *Paradis*, para. 27.

<sup>11</sup> See the BIA, s. 59(1).

<sup>12</sup> In that case the total claims would have been \$10,709,205.04 + \$2,807,478.12 = \$13,516,683.16. Dividing \$2,807,478.12 by that amount yields just under 20.8%, which is not enough to make the proposal fail the 66% (two thirds) threshold.

**E. BIA s. 59(3)**

25. As stated above, the Proposal Trustee understands that Moroccanoil's opposition will be based on BIA s. 59(3), in relation to s. 173(o). It may therefore be of assistance to outline the statutory provisions and some authorities that discuss their application. The Proposal Trustee also wishes to comment briefly on s. 173(a).

26. BIA s. 59(3) provides as follows:

**59 (3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.**

[Emphasis added.]

27. BIA s. 173(a) and (o) provide as follows:

(a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;

(o) the bankrupt has failed to perform the duties imposed on the bankrupt under this Act or to comply with any order of the court.

**1. BIA s. 173(a)**

28. The Proposal Trustee estimates that the value of the Company's assets on a liquidation basis is approximately \$780,000, and that the value of the Company's unsecured liabilities is approximately \$11,000,000 (excluding Moroccanoil's contingent claim).<sup>13</sup> The

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<sup>13</sup> As more fully set out in the Company's statement of affairs updated in the Proposal Trustee's report to creditors on the Proposal dated March 23, 2022 tabled at the creditors' meeting, of which a copy is Appendix "W" to the Proposal Report (page 174 of the Proposal Trustee's motion record); Proposal Report, tab 2 (page 8) of the Proposal Trustee's motion record, para. 20.

Company's assets are therefore not "of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities" under BIA s. 173(a).

29. The caselaw has made clear that the s. 59(3) requirement for security does not apply in respect of s. 173(a) if the debtor satisfies the "defence", included in the latter subsection, that the situation has "arisen from circumstances for which the [debtor] cannot justly be held responsible."<sup>14</sup> The caselaw also notes that the trustee is to comment on the reasons for insolvency and that the court may rely on the same in its determination as to whether s. 173(a) is engaged. As described by the Quebec Court of Appeal (our translation):

Under this section, the bankrupt must show that the situation is not attributable to him. Where, however, the trustee's report states that the bankrupt cannot be held liable for the situation referred to in section 173(1)(a) of the Act, the burden of proof is reversed and it is up to the objector to show the contrary.<sup>15</sup>

30. In the case of the Company, the Proposal Trustee's opinion, stated in its most recent report filed for this motion, is that the insolvency was caused by the COVID-19 pandemic and the resulting mandatory government measures, lockdowns, and restrictions on capacity, which resulted in reduced attendances affecting mall traffic and personal care services.<sup>16</sup> The Proposal Trustee has issued two material adverse change reports during these BIA proceedings due to the re-introduction of more stringent restrictions on malls and/or aesthetician services.<sup>17</sup> The Proposal Trustee believes that those are circumstances for which the Company cannot justly be held responsible.

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<sup>14</sup> See *Paradis*, para. 34.

<sup>15</sup> *Lennox Industries (Canada) Ltd. c. Entreprises électriques Pierre Charlebois inc.*, [1999 CanLII 13424 \(QC CA\)](https://www.canlii.ca/txt/en/can/laws/act/bia/1999/13424.html), p. 12-13.

<sup>16</sup> Proposal Report, tab 2 (page 8) of the Proposal Trustee's motion record, para. 21.

<sup>17</sup> Copies of the material adverse change reports are included at Appendices "F" and "S" to the Proposal Report (respectively pages 48 and 122 of the Proposal Trustee's motion record); Proposal Report, tab 2 (page 8) of the Proposal Trustee's motion record, paras. 6, 14.

**2. BIA s. 173(o)**

31. The Proposal Trustee understands that Moroccanoil’s objection to the court’s approval of the Proposal is based on Moroccanoil’s position:

- a. that the Company breached its duties under the BIA (particularly s. 50.4(1)(c)) by effecting late disclosure of the BEI security and debt, and only listing Moroccanoil as a creditor after Moroccanoil learned about these proceedings on its own, thereby establishing a fact under BIA s. 173(o) and engaging the “reasonable security” restriction on proposal approval provided for in BIA s. 59(3), and
- b. that the Proposal does not provide for “reasonable security” within the meaning of BIA s. 59(3).

32. As to the BEI security and debt:

- a. the Proposal Trustee agrees that a debtor is required to provide full disclosure to its creditors of its assets and liabilities,<sup>18</sup> and that the BEI security and debt was not disclosed at the outset of the notice of intention proceeding. The BEI debt was eventually disclosed in the second statement of affairs on March 12, 2021 as discussed above, which was approximately 6 months after the initial statement of affairs filed with the notice of intention on September 28, 2020.
- b. the Proposal Trustee is not aware of any prejudice to the Company, its creditors or the insolvency proceeding caused by this late disclosure.
- c. whether this circumstance constitutes a breach of duty within the meaning of BIA s. 173(o) is for the court to determine.

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<sup>18</sup> See BIA s. 50.4(1)(c) and *Kitchener Frame*, para. 35.

33. As to the fact that Moroccanoil was not initially included as a creditor in the BIA proceedings:

- a. the Proposal Trustee agrees that Moroccanoil should have received notice of this proceeding at the outset, despite its claim being contingent.
- b. it is arguable that the US Proceeding, in which the Moroccanoil claims were being litigated, was not stayed by the filing of the notice of intention, which may be said to set Moroccanoil apart from all other creditors of the Company in terms of the effects of the insolvency filing.
- c. the Proposal Trustee is not aware of any prejudice to the Company, its creditors or the insolvency proceeding caused by this late disclosure. Moroccanoil was not able to participate in the first meeting of creditors or in the three extension of time motions. However, Moroccanoil was able to file a proof of claim on August 19, 2021 and it was able to participate in the second creditors' meeting on October 28, 2021 as well as in the creditors' meeting of creditors of March 31, 2022 at which the Proposal was approved.
- d. despite Moroccanoil's participation at the second and last creditors' meetings, no creditor except Moroccanoil was of the opinion that a bankruptcy is preferable to the Proposal based on the votes cast. This may be instructive as to any prejudice that Moroccanoil did or did not suffer by being unable to participate in the proceeding until June 2021 so as to argue, for example, that the extensions of time to file a proposal should not have been granted.
- e. whether this circumstance constitutes a breach of duty within the meaning of BIA s. 173(o) is for the court to determine.

**3. “Reasonable security” and court discretion**

- 34. If the court determines that BIA s. 173(o) is engaged, then the requirement for “reasonable security” in BIA s. 59(3) is triggered.
- 35. The caselaw on BIA s. 59(3) is relatively scarce, but has established that:
  - a. it is the proposal that must provide for the reasonable security, not necessarily the debtor.<sup>19</sup>
  - b. per the terms of subs. 59(3), the court retains discretion to accept a security that is of any percentage of the amount of unsecured claims, but not 0% (i.e., the lack of any security at all).<sup>20</sup>
  - c. the security can be provided in express terms in the proposal, but may also be implicit.<sup>21</sup>
- 36. The Proposal Trustee understands that the term “security” in BIA s. 59(3) may refer to an element of the proposal that makes it more likely to be fully executed. The Proposal Trustee sees implicit security in the Proposal:
  - a. this is not a proposal consisting in periodic payments, which is contingent on cashflow and profitability. By the terms of the Proposal, the Company will constitute a single Creditor Payment Fund in the amount of \$2,430,000. From that perspective, the Creditor Payment Fund may be construed as security for the performance of the Proposal.
  - b. in the Proposal Trustee’s understanding, the Company will fund the Creditor Payment Fund using *inter alia* the \$1.5 million set aside at the occasion of the

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<sup>19</sup> *Cadillac Explorations Ltd. (No. 3), Re*, [1984 CanLII 425 \(BC SC\)](https://canlii.ca/t/1984canlii425bcsc), paras. 24, 25.

<sup>20</sup> *Wandler*, para. 36.

<sup>21</sup> *Wandler*, para. 24, 35.

Moroccanoil motion on the validity of the BEI security, discussed above. The Company's assets also include \$550,000 in cash.<sup>22</sup> Such direct availability of funds may be construed as security for the performance of the Proposal.

- c. the Costs Agreement, through which the Company is estimated to save approximately \$650,000 to \$850,000 in legal costs not including any appeal, may be considered a form of security for the performance of the Proposal. But for the Costs Agreement, the Company would not have sufficient cashflow to fund the US Proceeding. The Company would therefore be unable to defend the action, which would be detrimental, if not fatal, to the performance of the Proposal. Moreover, the Company is also seeking, by counterclaim in the US Proceeding, judgment against Moroccanoil in the amount of approximately \$6,530,000 in damages and legal fees. The Costs Agreement will allow the Company to pursue those claims that it believes are valid. If the Company is successful, the Paid Net Judgment amount will be added to the Creditor Payment Fund, which would further increase creditor recovery.<sup>23</sup>
- d. the Company, pursuant to the terms of the settlement agreement which is at play in the US Proceeding, obtained a bond to secure its and Mr. Antonio Conforti's possible liability for breach. The total amount posted as security for the bond is \$697,901.57 United States Dollars. The bond remains outstanding and will reduce any Company's liability at the outset of the US Proceeding or consist in Bond Funds

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<sup>22</sup> As more fully set out in the Company's statement of affairs updated in the Proposal Trustee's report to creditors on the Proposal dated March 23, 2022 tabled at the creditors' meeting, of which a copy is Appendix "W" to the Proposal Report (page 174 of the Proposal Trustee's motion record).

<sup>23</sup> See the updated amended Proposal of which a copy is Appendix "AC" to the Proposal Report (page 197 of the Proposal Trustee's motion record), s. 7.1(b).

to be added to the Creditor Payment Fund. The bond may therefore be considered a form of security for the performance of the Proposal.<sup>24</sup>

37. If one **(i)** takes the value of the Creditor Payment Fund (\$2,430,000), plus that of the Costs Agreement at the lower end of the expected spectrum (\$650,000), plus that of the Bond Fund (\$697,901.57 USD) and **(ii)** does not consider the potential for any Paid Net Judgment amount as part of the total plus-value offered by the Costs Agreement, then the minimum total implicit security provided for in the Proposal to secure its performance equals approximately \$3,984,285 CAD, which is 37.2% of the value of unsecured claims admitted for voting on the Proposal (i.e., \$10,709,205.04). The Proposal Trustee believes that this constitutes “reasonable security” which the court may in its discretion accept as sufficient.
38. The Proposal Trustee does not believe that this is a case where there is sufficient reason to cause the Company to go bankrupt despite the creditor’s approval of a reasonable Proposal, and to the detriment of all stakeholders with a continuing interest in the business, such as suppliers, customers, landlords and employees.
39. In regard to BIA s. 173(o), the Proposal Trustee has considered caselaw to the effect that “Canadian law allows the court to approve a proposal notwithstanding a reprehensible conduct from the debtor”<sup>25</sup> in an appropriate case. A standard of perfection does not appear necessary for proposal approval. That is among other things because, as seen above, the court must consider the interests of all stakeholders, and weigh the effects of the approval of the proposal versus those of a bankruptcy.<sup>26</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *Chabot c. Philibert*, [1995 CanLII 4848 \(QC CA\)](https://www.canlii.org/en/qc/ca/doc/1995/4848/1995-canlii-4848-qc-ca), p. 3-4 (our translation).

<sup>26</sup> *Magi*, para. 19b); *Chan*, para. 17; *Paradis*, para. 27; *Wandler*, para. 11.

40. The Proposal Trustee has also considered a case where a creditor opposed the court's approval of a proposal, arguing that not all creditors had equal information prior to the time of voting. The Quebec Court of Appeal said that "The reproach does not hold. [The Appellant] was present at the meeting of creditors and was also represented by his lawyers. All creditors had the opportunity to ask questions to the trustee and the [debtor]. There were no restrictions on the right to speak and the right to question. All the documents necessary to make a decision were available."
41. The Proposal Trustee believes that this is analogous to the herein case. At the time of voting on the Proposal, Moroccanoil and all other creditors had had a reasonable opportunity to formulate their position as to the Proposal and the Company's affairs, including as regards Moroccanoil's claim and the BEI debt. Indeed, Moroccanoil has had an opportunity to present a motion regarding the validity of the BEI debt's security, on which motion Moroccanoil cross-examined the Company's principal and was successful. As well, the Moroccanoil claim and the context and basis thereof had been set out in Proposal Trustee reports, and was the subject of a Proposal Trustee motion that also proceeded on a contradictory basis.
42. The Proposal Trustee therefore does not believe that, on a balance of probabilities, a sufficient prejudice has been created, whether to Moroccanoil, creditors as a whole, or the insolvency proceeding, that would warrant causing the Proposal to fail and the Company to go bankrupt, on the basis of the Proposal not providing for "sufficient security" – or otherwise on the basis of reasonableness, as seen below.

**F. Proposal's reasonableness generally (BIA s. 59(2))**

43. The Proposal Trustee believes that the terms of the Proposal are calculated to benefit the general body of creditors. The Proposal Trustee is of the opinion that the Proposal provides for a greater recovery than bankruptcy. The Proposal Trustee estimates, based on claims filed and not including contingent claims, that the return to creditors in a bankruptcy would be approximately 13%, versus approximately 20% under the Proposal. If the Proposal Trustee included contingent claims to the estimate (approximately \$3.2 million, including Moroccanoil's), the return to creditors in a bankruptcy would be approximately 11% versus 16% under the Proposal. In addition, the Proposal offers funding and a vehicle for the Company to seek to recover on a claim for damages against Moroccanoil, which if successful may result in additional creditor recovery.
44. Further, the Proposal Trustee believes that all the terms of the Proposal are reasonable (i.e., that none are unreasonable). The Proposal is based on commonly used and court-approved precedents that stood the test of time.
45. Lastly, the Proposal Trustee notes that beyond creditors, the wider group of stakeholders of the Company, including 540 employees, suppliers and customers, have their interests in the Company's business preserved in a going concern proposal, unlike a bankruptcy and liquidation.<sup>27</sup>
46. Therefore, the Proposal Trustee believes that the BIA s. 59(2) requirements are met.

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<sup>27</sup> Proposal Report, tab 2 (page 8) of the Proposal Trustee's motion record.

## G. Conclusion

47. For those reasons, the Proposal Trustee supports the court's approval of the proposal, including due to its unanimous (but for Moroccanoil) creditor approval, its terms being reasonable and calculated to benefit the general body of creditors, it offering greater recovery for creditors than a bankruptcy, it providing for reasonable security (should the court find this to be necessary or appropriate), and it preserving other stakeholder interests (such as that of employees, suppliers, landlords and customers) which would be lost in bankruptcy.

48. As a final comment on Moroccanoil's stated opposition, the Proposal Trustee notes that Moroccanoil is different from all other creditors of the Company in that it has no reasonable prospect of ongoing business relationship with the Company given the ongoing litigation between them. Without suggesting any bad faith, it would also be open for assumption that Moroccanoil would not be upset if the Company went bankrupt and was unable to defend or continue to pursue its claims against Moroccanoil in the US Proceeding.

49. Those circumstances set Moroccanoil apart from landlords, suppliers, and other creditors whose claims are compromised under the Proposal and who all voted in favour of it. Moroccanoil's perspective on the Proposal is therefore isolated.

50. The Proposal Trustee has reviewed the case of *Paradis*,<sup>28</sup> where a contingent creditor who was engulfed in litigation against the debtor company and had no prospects of ongoing business with it was opposing the approval of the company's proposal. The Quebec Superior Court found that the opposing creditor had different incentives than "the vast

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<sup>28</sup> *Paradis*, cited above, note **Erreur ! Source du renvoi introuvable.** [[2019 QCCS 2016](#)].

majority of creditors” and acted “without necessarily considering the possibility for all creditors of a benefit to be derived from a commercial reorganization as opposed to a bankruptcy.” The court then stated, at para. 105, that “this is where the court, who must take into consideration the interest of all creditors, must intervene”:

[101] Le Tribunal observe que la très grande majorité des créanciers ayant voté en faveur des propositions concordataires déposées par Paradis et Morin, incluant ceux ne détenant aucune garantie, sont associés à la réalisation de leurs projets immobiliers, que ce soit comme promoteurs, prêteurs, fournisseurs ou professionnels, et ont ainsi davantage à gagner si les deux proposants ne sont pas mis en faillite.

[102] Ces créanciers préfèrent sans doute attendre des jours meilleurs et maintenir leurs relations d’affaires avec Paradis et Morin.

[103] Stesi et Terrassement, qui ne détiennent aucune garantie sur d’autres immeubles et dont les perspectives d’affaires futures avec Paradis et Morin sont maintenant peut-être compromises vu le présent litige, voient les choses autrement.

[104] Ces constats sont le lot de toute réorganisation commerciale où les optimistes et les pessimistes recherchent une solution possible autre que la faillite, alors que d’autres créanciers se sentent lésés et veulent à tout prix la mise en faillite de leur débiteur, sans nécessairement considérer la possibilité pour l’ensemble des créanciers d’un bénéfice pouvant être retiré d’une réorganisation commerciale par opposition à une faillite.

[105] C’est alors qu’intervient le Tribunal qui doit prendre en considération l’intérêt de tous les créanciers, particulièrement celui de ceux qui ont tout à perdre et qui n’ont que peu ou pas d’influence du tout.

[Emphasis added.]

#### **IV. NATURE OF THE ORDER SOUGHT**

51. The Proposal Trustee therefore supports the court’s approval of the Company’s Proposal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 8<sup>th</sup> day of July, 2022.

*Joël Turgeon*

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**Brendan Bissell** – LSO #: 40354V  
Tel: (416) 597-6489  
Email: [bissell@gsnh.com](mailto:bissell@gsnh.com)

**Joël Turgeon** – LSO #: 80984R  
Tel: (416) 597-6486  
Email: [turgeon@gsnh.com](mailto:turgeon@gsnh.com)

Lawyers for Crowe Soberman Inc. in its capacity as trustee to the proposal to creditors of Conforti Holdings Ltd.

## SCHEDULE A – LIST OF AUTHORITIES

1. *Paradis et Stesi Société immobilière*, [2019 QCCS 2016](#)
2. *Kitchener Frame Limited (Re)*, [2012 ONSC 234](#) (Morawetz J., as he then was)
3. *Re Wandler (Proposal)*, [2007 ABQB 153](#)
4. *Magi (Syndic de)*, [2006 QCCS 5129](#) (Gascon J., as he then was)
5. *Chan (Proposition de)*, [2007 QCCA 727](#)
6. *Dupré (Syndic de)*, [2011 QCCS 6165](#)
7. *Lennox Industries (Canada) Ltd. c. Entreprises électriques Pierre Charlebois inc.*, [1999 CanLII 13424 \(QC CA\)](#)
8. *Cadillac Explorations Ltd. (No. 3), Re*, [1984 CanLII 425 \(BC SC\)](#)
9. *Chabot c. Philibert*, [1995 CanLII 4848 \(QC CA\)](#)

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## SCHEDEULE B – RELEVANT STATUTES

*Bankruptcy and Insolvency Act, [R.S.C., 1985, c. B-3](#)*

**50 (14)** A provision for the compromise of claims against directors may not include claims that

- (a) relate to contractual rights of one or more creditors arising from contracts with one or more directors; or
- (b) are based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors.

**54 (1)** The creditors may, in accordance with this section, resolve to accept or may refuse the proposal as made or as altered at the meeting or any adjournment thereof.

(2) For the purpose of subsection (1),

- (a) the following creditors with proven claims are entitled to vote:
  - (i) all unsecured creditors, and
  - (ii) those secured creditors in respect of whose secured claims the proposal was made;
- (b) the creditors shall vote by class, according to the class of their respective claims, and for that purpose
  - (i) all unsecured claims constitute one class, unless the proposal provides for more than one class of unsecured claim, and
  - (ii) the classes of secured claims shall be determined as provided by subsection 50(1.4);
- (c) the votes of the secured creditors do not count for the purpose of this section, but are relevant only for the purpose of subsection 62(2); and
- (d) the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors — other than, unless the court orders otherwise, a class of creditors having equity claims — vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution.

**59 (1)** The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

(2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

(3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

**173** (1) The facts referred to in section 172 are:

- (a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;
- (o) the bankrupt has failed to perform the duties imposed on the bankrupt under this Act or to comply with any order of the court.

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**IN THE MATTER OF THE PROPOSAL TO CREDITORS OF CONFORTI HOLDINGS  
LIMITED, A CORPORATION INCORPORATED UNDER THE ONTARIO BUSINESS  
CORPORATIONS ACT, R.S.O. 1990, C. B.16**

Court/Estate File No. 31-2675583

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**Proceeding commenced in TORONTO**

**PROPOSAL TRUSTEE'S FACTUM  
(motion for court approval of proposal)  
(returnable July 19, 2022)**

**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto (ON) M5G 1V2

**Brendan Bissell** (LSO# 40354V)  
Tel: (416) 597-6489  
Email: [bissell@gsnh.com](mailto:bissell@gsnh.com)

**Joël Turgeon** (LSO #80984R)  
Tel: (416) 597-6486  
Email: [turgeon@gsnh.com](mailto:turgeon@gsnh.com)

Lawyers for Crowe Soberman Inc. in its capacity  
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